Simply Unbelievable: Reasonable Women and Hostile Environment Sexual Harassment

Sarah A. DeCosse*

> Before the eyes of a nation, a tenured law professor beloved by her students was transformed into an evil, opportunistic harpy; a deeply religious Baptist was turned into a sick and delusional woman possessed by Satan and in need of exorcism; this youngest of 13 children from a loving family became a frustrated spinster longing for the attentions of her fast-track superior, bent on exacting a cruel revenge for his rejection.
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> These skillful transformations of Anita Hill's character by some members of the Senate were effective because they were familiar, manageable images of African-American womanhood. . . . In their extremity, these are images far more accessible and understandable than the polished and gracious dignity, the cool intelligence that Anita Hill displayed in the lion's den of the Senate chamber. However she found herself reconstituted, the result was the same. She was, on all levels, simply unbelievable.
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> . . . As credible, as inspiring, as impressive as she was, most people who saw her had no context in which to judge her. . . . Quite simply, a woman like Anita Hill couldn't possibly exist. And in that sense, she is in fine historical company.[1]

If Anita Hill were to bring a hostile environment sexual harassment claim in the United States Court of Appeal for the Ninth Circuit today, she would be evaluated according to the "reasonable woman" standard relied on in the *Ellison v. Brady* decision.[2] Although the standard suggests movement beyond the constricting

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* Sarah DeCosse received her B.A. in Honors English from Georgetown University's College of Arts and Sciences. Prior to entering law school she was a Peace Corps volunteer in the Dominican Republic and an advocate for battered women and victims of sexual assault. In 1991 and 1992, she has participated in the human rights struggle of the Haitian people.

As an author, her perspective is shaped by her work experiences, her education, and the family and friends who have given her the gift of their stories. She writes as an European-American woman.

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1. Rosemary L. Bray, *Taking Sides Against Ourselves*, N.Y. TIMES MAGAZINE, Nov. 17, 1991, at 56.

2. Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991).

images which were used to discredit Hill, it also reduces the woman complainant's legitimacy to concordance with a limited notion of "reasonableness."[3] Yet, in the face of persistent challenges to women's credibility in the American legal system, *Ellison*'s "reasonable woman" standard may serve as the first step towards a legal standard in hostile environment sexual harassment claims which better reflects women's varied experiences and offers them genuine protection of the law.[4]

In sexual harassment claims, women have been disregarded, silenced, or presumed incredible in their response to conduct which males have long perceived, or at least excused, as innocuous.[5] The Ninth Circuit Court of Appeals' adoption of a "reasonable woman" standard represents a clear shift in the law of hostile environment sexual harassment by a respected court. A careful examination of the basis underlying the *Ellison* "reasonable woman" standard reveals that although the symbolic adoption of a woman's perspective is valuable, the court failed to fully flesh out the "reasonable woman." To adequately interpret a woman's experience, courts must recognize the fundamental inequities at play in a situation of sexual harassment, and how a multitude of factors, including the woman's race, class and sexual orientation, impact her experience.[6] The true incorporation of the breadth and diversity of women's experiences may eventually push courts beyond assertions of universal principles that claim neutrality, such as reasonableness.[7]

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3. *Id.*

4. Recent surveys of the legal profession demonstrate that "a woman's sex places her at a disadvantage as a litigant, party in domestic conflicts, practicing attorney, and even as an employee of the court." *See* Gail Diane Cox, *Reports Track Discrimination: Fourteen Volumes Chronicle how Women are Treated in Court*, NAT'L L.J., Nov. 26, 1990, at 1.

5. *See* Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813 (1991).

6. *Cf.* Lucinda F. Finley, *Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 NOTRE DAME L. REV. 886, 907-08 (1989). Finley commented,

> [T]he feminist project of incorporating "women's experience" into legal definitions is not as simple as "one, figure out who or what is 'women'; two, consult women's experience; and three, add it to law and stir." Women's experiences are diverse and often contradictory . . . . Legal activists . . . can embrace the fact that women have many very different experiences and can start working into the law the questions raised by women's challenges to the prevailing legal constructions of situations.

Id.

7. *See id.* at 910. Finley concluded that:

> Because legal reasoning can be sensitive to context, we can work to expand the context that it deems relevant. By pulling the contextual threads of legal language, we can work towards making law more com-

I. Women's Credibility Gap in the Legal Field

For courts to incorporate the diversity of women's experiences into the decision-making process, they must first listen to what women witnesses have to say. Unfortunately, recent studies have shown that women suffer from a wide credibility gap in the legal field. One study concluded that "women, be they attorneys, witnesses or otherwise, generally were perceived as having less credibility than men."[8] In another study, more than half the judges and almost three-quarters of the lawyers polled remarked that they perceived gender discrimination to exist towards litigants, witnesses and attorneys in the state courts.[9] Responding to the succession of highly publicized challenges to women's credibility, one columnist suggested that "somewhere, from the depths of mythology about women, the suspicion always arises that women are just not reliable."[10]

Continuing research unveils the biases which shape the law, including supposedly universal, neutral standards and principles which merely institutionalize the experiences of elite white males.[11] Although hostile environment sexual harassment case law has, in general, recognized an inequity, it has failed to fully explore that inequity and formulate a sufficient response. Efforts to

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> fortable with diversity and complexity, less wedded to the felt need for universalizing, reductive principles.

Id.

8. *How Gender Bias Creeps into Courts; Judicial Council Proposals are Brilliantly to the Point*, L.A. TIMES, Nov. 27, 1990, at B6.

9. *Gender Bias in State Courts, Says Task Force Report*, PR NEWSWIRE, Olympia, Wash., Aug. 25, 1989.

10. Caryl Rivers, *Is There No Believable Woman to Accuse a Powerful Man?*, L.A. TIMES, Dec. 12, 1991, at A29. Rivers pointed to how the varied demeanor and behavior of Anita Hill and the woman who charged William Kennedy Smith with rape resulted in both being stereotypically "branded." "The fact is, we do not believe women who seem to have no apparent motive for lying and not much to gain, either. But we do believe powerful men even though they have a lot to gain from not telling the truth." *Id.* Clearly, men, and not women, gain from perpetuating these stereotypes.

> Is it more logical to think Anita Hill invented the stuff about porno talk because she is a nutty scorned woman, or that Clarence Thomas—who was known to be a viewer of such films—in fact borrowed some language from flicks he watched? . . . Fantasies about women breed in the shadows, and it's only when they are exposed that they can be seen as the bizarre, twisted creatures that they are.

Id.

11. *See* Angela P. Harris, *Race an Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 582-83 (1990). Harris views the Preamble to the Constitution ("We the People. . .") as the first historical instance of one voice claiming to speak in universal terms for a group, where in fact the views expressed were not truly shared by anyone other than those empowered to write them. She explains that the power of this voice lasts only as long as the other voices remain silenced. *Id.*

reform the American legal system to respond to challenges to women's credibility in other legal areas are instructive. The best known corrective measures are rape-shield laws, designed to exclude irrelevant testimony about the sexual history of a sexual assault victim.[12] In other legal areas, bias against women is only slowly being unearthed.[13]

The profusion of stereotypes about women who bring charges of rape caused reform of rape laws, with measures such as rape shield statutes. A Manhattan district attorney in the Sex-Crimes Unit remarked of a victim's testimony in a rape case, "It's almost like a product . . . . You're selling the credibility of this woman."[14] Rape cases often require the victim not only to prove her case against the defendant, but also to demonstrate her own credibility.[15] This burden placed upon victims of rape to demonstrate their credibility does not exist for victims of other crimes, whose sincerity is rarely challenged.[16]

The most notable myth about a woman bringing a rape charge is that her sexual history bears on her credibility. Thus, if a rape victim is a prostitute, she is perceived as an especially unreliable witness.[17] Yet, if the woman has or had some type of affec-

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12. Lori Heise, *When Women are Prey; Around the World, Rape is Commonplace—and the Victims Can't Fight Back*, WASH. POST, Dec. 8, 1991, at C1. Heise described the adoption of rape-shield laws by all 50 states as an answer to "the tendency for juries to discount testimony from sexually active women." *Id.* Yet, she pointed to "subtle prejudice" in the U.S. legal system which continues to undermine women's credibility. *Id.*

13. *See, e.g.*, Steven H. Miles & Allison August, *Courts, Gender and "The Right to Die"*, 18:1-2 LAW, MEDICINE & HEALTH CARE 85 (1990).

14. Peter Marks, *He Cried Romance; She Cried Rape*, NEWSDAY, July 21, 1991, at 4. Attorneys added that a case became more difficult when the accused was a good-looking, young, well-connected man and the charge was acquaintance rape. *Id.*

15. Nicole Rosenberg Economou, *Defense Expert Testimony on Rape Trauma Syndrome: Implications for the Stoic Victim*, 42 HASTINGS L.J. 1143, 1161-62 (1991) (citations omitted). A prosecutor must:

> wage war against a general feeling of distrust and distaste for rape victims. In addition, she must present her case to a jury that may entertain various misconceptions about women and rape. Jurors tend to believe, for example, that the victim was "asking for it," that she actually wanted to be raped, or that she was not raped at all. Implicit in these beliefs is the assumption that the woman bringing formal criminal charges against the defendant is not to be believed.

Id.

16. Peter Marks & Michele Ingrassia, *When the Rapist is Someone She Knows*, NEWSDAY, July 21, 1991, at 4. Describing challenges to credibility, prosecutor Susan Onorato commented, "It's like the scarlet letter is 'R.' If you come into court with it, you have to overcome it."

17. Just five years ago, a California Superior Court judge dismissed rape charges against a defendant explaining that since the victim was a prostitute she could not be the victim of rape. *See* Tracy Wilkinson, *Victim for Alleged Rape May*

tional relationship with the rapist, her credibility also suffers.[18] The believability of the woman witness is also undermined by arguments that her appearance, her clothes, her age and even how she applies make-up speak to her honesty.[19] Women's reactions to having been raped have also been used to challenge their truthfulness, often for failing to respond in expected ways.[20] The development of rape-shield laws now prevent the admission of irrelevant sexual history of the victim. Expert testimony on the Rape Trauma Syndrome should also improve the credibility problem of women victims, particularly those who are discredited for having responded "incorrectly" to having been raped.[21]

The law has also begun to recognize credibility problems of women who bring charges of battery against their husbands or significant others.

As in marital rape cases, women bringing these charges suffer from traditional presumptions that they do not have a right to such a claim.[22] Although the courts no longer silence women on this issue, neither do they treat these women as entirely reliable witnesses. The fact that a woman neither leaves her husband or significant other, nor reports an alleged beating, has been introduced as evidence that no battery occurred. Yet, with the admission of expert testimony regarding Battered Women Syndrome, which explains the typical behavior patterns in response to continuing violence in the home, the perception of battered women as credible witnesses has improved.[23] Moreover, the fact that bat-

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Have Fled Because of History as Prostitute, L.A. TIMES, Nov. 17, 1990, at B3. In another case, four men charged with rape had been arrested when they were observed by police holding a gun to a woman's head in a parked car. *Id.* Like many other prostitutes who are the victims of violent crimes, the victim in this case did not appear to testify against the defendants. *Id.*

18. *See* Marks & Ingrassia, NEWSDAY, *supra* note 16, at 4. By virtue of their present or past relationship with their assailant, victims of acquaintance rape and more so, marital rape, must overcome a presumption that unless they explicitly, even violently protest a sexual advance, they are perpetually sexually available. *See infra* note 23 and accompanying text.

19. *See* Marks & Ingrassia, *supra* note 16, at 4. *See also*, Karla Fischer, *Defining the Boundaries of Admissable Expert Psychological Testimony on Rape Trauma Syndrome*, 1989 U. ILL. L. REV. 691, 700 n.59 (1989) (citing to *State v. Stafford*, 346 S.E.2d 463, 464 (N.C. 1986) in which the judge referred to the 13 year-old victim of rape as a "junior high school student . . . 125 pounds, and well developed for her age.").

20. Economou, *supra* note 15.

21. *See id.*

22. Elizabeth M. Schneider & Susan B. Jordan, *Representation of Women Who Defend Themselves in Response to Physical or Sexual Assault*, 4 WOMEN'S RTS. L. REP. 149, 153 (Spring 1978).

23. *See* Sarah Crippen Madison, *A Critique and Proposed Solution to the Adverse Examination Problem Raised by Battered Woman Syndrome Testimony in*

tered women do speak out in the face of a society that may blame them for their batterer's actions should add to their credibility.[24] From the initial call for police assistance to the courtroom, however, the battered woman still faces the possibility that she simply will not be believed.

Still, by and large, women continue to suffer from the credibility gap. Women who participate in the making of violent pornography also fall into the credibility gap. Despite the fact that many of these women are involved in the business only because of blackmail and threats,[25] if they make an assault or rape charge, they are nonetheless perceived as unreliable witnesses.[26] The credibility gap for prostitutes arises out of a theory that a prostitute could not legally be raped; if a woman has sold her sexuality for any reason, then she cannot regain it for herself.[27] Hence, her claim to her own sexuality must be unbelievable.

Women are perceived in the legal system as less reliable than men, even where violence is not explicitly at issue. A recent study concluded that there are dramatically different interpretations of the wishes of incompetent patients according to their gender.[28] Women's preferences for treatment are often disregarded, but the same expression by a man would be considered adequate testimony to his wishes.[29]

STATE V. HENNUM, 74 MINN. L. REV. 1023, 1033-35 (1990). The battered women syndrome describes a cycle of escalating violence in the home, from which the woman, tied economically, or because of her children to the batterer, only gradually escapes.

Judges, lawyers and juries have begun to recognize that there are many compelling reasons why a woman does not leave a batterer at the first sign of abuse, including financial dependence, risk of retaliation to her and her children, an apology by the batterer and the desire to keep the family together.

24. *See* Kathleen Waits, *The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solutions*, 60 WASH. L. REV. 267, 307 (1985). When a battered woman does speak out, she may minimize the violence against her because of her awareness that she may be found culpable for an act of violence against herself.

25. Deana Pollard, *Regulating Violent Pornography*, 43 VAND. L. REV. 125, 133 (1990). Some of the women are prostitutes who are forced by their pimps to participate. *Id.* at 133-34. Many of the women fear retaliation if they do not continue to perform. *Id.* at 134.

26. *Id.* at 134.

27. Catharine A. MacKinnon asserts that pornography itself "strips and devastates women of credibility" whether their claim is sexual assault or sexually offensive language. *See* CATHARINE A. MACKINNON, *Francis Biddle's Sister: Pornography, Civil Rights and Speech*, in FEMINISM UNMODIFIED 163, 193 (1987).

Pornography's objectification of women as sexual objects who only find fulfillment in men undermines the perception of women as complete human beings, capable of considerate and clear decision-making.

28. Miles & August, *supra* note 13.

29. *Id.* at 87-89. When patients expressed their preferences for continuing

These examples reveal a bias in the law that men's judgments and decisions are more deserving of legal protection than women's. This bias perpetuates a distorted view of women and results in their being afforded unequal protection of the law. In cases of sexual harassment, women plaintiffs have encountered the same presumptions of poor credibility that have stifled women who have sought other types of legal protection.[30] In her article, *Sex at Work*, Susan Estrich concludes that sexual harassment case law reveals that "these are not cases of people judging other people. They are cases of men judging women on the topic of sex. And on that topic, women, because they are women, bear an enormous burden of proof."[31] She adds that in order "to meet these burdens, one must first be believed—no easy task when the rules of credibility are stacked against women."[32]

This persistent discrediting of women's words and experiences seems particularly ironic in the area of sexual harassment law, which is rooted in the recognition of discrimination against women. According to Catharine MacKinnon, discrimination law is built upon an awareness of fundamental inequalities in our society, that "Women's place at work and in sexual relations . . . [is] separate and subordinate and not equal."[33] She challenges the reluctance to enforce sexual harassment law: "If sexual harassment expresses the pervasive reality of normal relations between the sexes, and if these relations express unequal social power, then the feelings and practices that emerge are not reasons that the practices should be allowed."[34] Yet, the law has only recently begun to

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treatment or not, in the event they became incompetent, men's wishes were regarded as "rational" and displaying "passionate conviction" while women's were "unreflective, emotional or immature." *Id.* Only women were referred to in child-like terms, described as in the "fetal" position, or an "infantile state," and requiring the state to act as parens patriae. *Id.*

The cases consistently portrayed men as "subject to medical assault" while women were seen as "vulnerable to medical neglect." *Id.* at 89. When evidence of the wishes of women patients was brought to court, the women had to meet a clear and convincing standard, while men's statements were not held to a heightened standard. *Id.*

30. *See* Susan R. Klein, Comment, *A Survey of Evidence and Discovery Rules in Civil Sexual Harassment Suits with Special Emphasis on California Law*, 11 INDUS. REL. L.J. 540, 542-43, n.9 (citing *Sexual Harassment in the Federal Government; Hearings Before the Subcomm. on Investigations of the House Comm. on Post Office and Civil Service*, 96th Cong., 1st Sess. 19, 28 (1979)). "Women who do file sexual harassment complaints are treated as rape victims traditionally have been treated; their word is doubted and they are charged with immoral behavior."

31. Estrich, *supra* note 5, at 853.

32. *Id.*

33. CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 220 (1979).

34. *Id.*

address these fundamental issues of discrimination and to afford women who tell their stories of discrimination a hearing in which they are treated as credible witnesses.

II. Challenges to Women's Credibility in Hostile Environment Sexual Harassment Law

A. History

The continued credibility problems facing women sexual harassment complainants may be rooted in Congress' initial lack of commitment to the issue. The inclusion of gender discrimination in the workplace in the Civil Rights Act of 1964[35] is said to have been a political attempt to prevent the law's passage.[36] Yet, despite the belief by some that women objecting to workplace discrimination was ludicrous, the bill became law.[37]

However, the creation of a cause of action for sexual harassment did not follow immediately. In 1979, Catharine MacKinnon published the influential book, *Sexual Harassment of Working Women*, in which she explored women's experiences of sexual harassment, the inequities that engendered such experiences, and responses to sexual harassment.[38] The following year the Equal Employment Opportunity Commission (EEOC) issued guidelines which explicitly stated that harassment on the basis of sex was a violation of Title VII of the 1964 Civil Rights Act.[39]

As MacKinnon had done, the EEOC guidelines distinguished two types of sexual harassment: quid pro quo and hostile environment.[40] Quid pro quo harassment consists of unwelcome sexual advances, the acceptance or rejection of which impacts employment decisions.[41] Hostile environment sexual harassment exists when sexual conduct "unreasonably interfer[es] with an individual's work performance or creat[es] an intimidating, hostile or offensive working environment."[42]

Despite the guidelines, courts were reluctant to permit a sexual harassment cause of action. Early attempts to bring suits were countered with the argument that Congress had not intended a sexual harassment cause of action.[43] Nonetheless, quid pro quo

35. 42 U.S.C. § 2000e (1964).
36. Estrich, *supra* note 5, at 816-17.
37. *See id.*
38. MACKINNON, *supra* note 33.
39. 29 C.F.R. § 1604 (1980). See Estrich, *supra* note 5, at 813, 818.
40. 29 C.F.R. § 1604 (1980); MACKINNON, *supra* note 33 at 32-47.
41. 29 C.F.R. § 1604.11(a)(1-2).
42. 29 C.F.R. § 1604-11(a)(3) (alteration added).
43. Estrich, *supra* note 5, at 818.

cases gained gradual acceptance.[44] Recognition of the hostile environment sexual harassment cause of action came only recently, with the United States Supreme Court's *Meritor v. Vinson* decision in 1986.[45]

B. Women's Credibility in Hostile Environment Actions

Courts have often dismissed women's sexual harassment claims as idiosyncratic oversensitive responses of women to a normal workplace situation.[46] However, several commentators have noted that the perception of sexual harassment as normal behavior is the root of the problem. Catharine MacKinnon stated, "Most men do not sexually harass women with an intent to injure the female sex. To act with an intent to subordinate women is to acknowledge the atrocity of the act, when it is precisely that it is considered totally normal that is its most atrocious feature."[47] Some twelve years later, in 1991, Susan Estrich concluded similarly, that:

> The problem with the court decisions, and the attitudes they reflect, is that offensive sexuality is so routinely considered normal, abuse of power acceptable, and the dehumanizing of women in sexual relations unremarkable, that when we (or the courts, at least) see such things at work, it hardly seems a "federal case."[48]

Because of the prevalence of this perspective, Estrich suggests that Title VII actions respond only to very unusual, egregious sexual harassment, while "the problem, by and large, is what is considered usual."[49] *Meritor v. Vinson*, the first hostile environment sexual harassment case decided by the Supreme Court, illustrates the law's requirement of particularly extreme circumstances before a woman's claim of sexual harassment would be recognized.

C. Meritor v. Vinson

Meritor v. Vinson, still the only sexual harassment case decided by the United States Supreme Court, demands that a woman demonstrate both that the implicated behavior was "sufficiently severe or pervasive" to create an abusive work environment and also that she indicated that the sexual advances were unwel-

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44. *Id.* at 818-20.
45. Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986).
46. *See, e.g.*, Rabidue v. Osceola Refining Co., 805 F.2d 611 (6th Cir. 1986).
47. MACKINNON, *supra* note 33, at 199.
48. Estrich, *supra* note 5, at 860.
49. *Id.*

come.[50] The opinion concedes that "whether particular conduct was indeed unwelcome presents difficult problems of proof and turns largely on credibility determinations."[51] The Court seeks resolution of this credibility problem through consideration of the "record as a whole."[52] The presentation and interpretation of that record is quite troubling.

The Supreme Court opinion in *Meritor v. Vinson*, purports to look at the record as a whole, yet it fails to make any mention of the fact that Mechelle Vinson was African-American.[53] The Court demonstrated no perception of the interplay between racial and sexual discrimination as directed against women of color, or the potential impact of that interplay on Vinson's credibility. Yet, "discrimination against women of color often operates differently, is fueled by different factors and results in different stereotypes, than discrimination against either men of color or white women."[54] The Court's failure to discuss Vinson's race reveals their perspective that it was not legally significant or even relevant. One legal commentator suggests that "only white people have been able to imagine that sexism and racism are separate experiences."[55] Stereotypical presumptions of African-American women may well have contributed to the Court's conclusion that Mechelle Vinson's clothes were legally relevant to the outcome of her case.[56]

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50. *Meritor*, 477 U.S.at 67.

51. *Id.*

52. *Id.*

53. *Id.*

54. Mary E. Becker, *Symposium: The Law and Economics of Racial Discrimination in Employment: Needed in the Nineties: Improved Individual and Structural Remedies for Racial and Sexual Disadvantages in Employment*, 78 GEO. L.J. 1659, 1675-76 (1991). She offers an example of African-American women.

> [S]ex has been historically used to subordinate black women; consider the frequent rape of female slaves by their owners and overseers. Even after abolition, black women could be raped with impunity, especially by white men. To this day, black women are seen as "easier" and more exotic sexual partners than white women. These and other factors . . . are likely to affect the treatment of African-American women in the job market.

She continues, "Similar points could be made about Hispanic women, Asian women and other women of color. Discrimination operates differently for each of these groups with respect both to men of their group and women of other groups. Asian women are, for example, seen as particularly passive." *Id.*

55. Angela Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 604 (1990), as quoted in Trina Grillo and Stephanie M. Wildman, *Obscuring the Importance of Race: The Implication of Making Comparisons between Racism and Sexism* (or other -isms), 2 DUKE L.J. 397, — n.23 (1991). The authors comment that "white supremacy makes whiteness to normative model. Being the norm allows whites to ignore race, except when they perceive race (usually someone else's) as intruding upon their lives. *Id.*

56. *Meritor*, 477 U.S. at 69.

Determining that some of her clothes were "sexually provocative," the Court took on the perspective not of Mechelle Vinson, but of a voyeur, of one who, in a usually passive way, might be "provoked."[57] Susan Estrich suggests,

> The consequences of this approach are devastating for women. Women are invisible as anything other than potential sexual objects of men . . . And in making the determination of harassment *of* women dependent upon the extent of "sexually provocative" behavior *by* women, the Court adopts a rule which holds women responsible for their own torment. Thus, the victim of harassment, like the rape victim, suffers not only the direct injury of sexual abuse, but also the indignity of the Court's presumption that she is to blame.[58]

In a case where the fact pattern includes multiple instances of forcible rape by Vinson's supervisor, Sidney Taylor, this conclusion of law seems outrageous. In light of the extreme violence and degradation of the conduct directed towards Mechelle Vinson, it appears the Court began this case with a presumption that she was to blame not only for her sex, but also for her race. The decision in effect set egregious conduct as the standard for an actionable cause of action.[59]

Due to preconceived notions of women's experiences, and their status in the workplace, women face challenging barriers to their perception as credible parties. Their testimony must often be buttressed by corroborating witnesses, and the truthfulness of their complaint may be challenged because of its timing.[60] One court dismissed a woman's claim because they perceived her testimony as "illogical."[61] The court reasoned that if the complainant really had been harassed, she would have spoken up about it. The decisions in sexual harassment cases reflect stereotypical presumptions of women's experiences. Courts tend to attribute complaints of sexual harassment to the theoretical motivation of the "scorned woman" or to categorize the woman as a "whore."[62] Cases minimize the woman's experience, "depict[ing] sexual taunts, inquiries or magazines as a comparatively harmless amusement, or as the treatment women should expect when they push their way into the workplace."[63] On the whole, courts have perceived women

57. *Id.*

58. Estrich, *supra* note 5, at 828-29.

59. *Meritor*, 477 U.S. at 60.

60. Estrich, *supra* note 5, at 848.

61. *Id.* at 852, (citing Benton v. Kroger, 640 F. Supp. at 1321 (S.D. Tex. 1986)).

62. *Id.* at 848-49.

63. Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1203.

complaining of sexual harassment as less than credible by virtue of their sex.

D. The Advent of the "Reasonable Woman" Standard

While early women complainants were judged according to a reasonable person standard, *Ellison*'s "reasonable woman" standard offers a closer approximation of women's experiences of sexual harassment. In *Rabidue v. Osceola Refining Co.*,[64] the court was reluctant to find that the complainant was a victim of hostile environment sexual harassment.[65] Plaintiff Vivienne Rabidue complained of obscene language and the display of posters of nude women in the workplace.[66] The majority used a reasonable person standard to examine Rabidue's complaint.[67] The court recommended a consideration of the working environment as a whole, "the lexicon of obscenity that pervaded" the workplace and the "reasonable expectation of the plaintiff upon voluntarily entering that environment."[68] The burden was placed upon the female employee to adapt to the male-dominated environment where sexual jokes, conversations and "rough hewn" language prevailed. The court found that Title VII was not meant to eradicate such an environment.[69] Thus, while purportedly giving fair consideration to a complaint of sexual harassment, the *Rabidue* court openly rejected the basic principle that disparities between the treatment of women and men exist in the workplace. The court, in essence, rejected the idea that "[d]iscrimination law exists to remedy such disparities."[70]

Circuit Judge Keith dissented, suggesting that in place of a

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64. Rabidue v. Osceola Refining Co., 805 F.2d 611 (6th Cir. 1986).

65. *Id.*

66. *Id.* at 615, dissent at 624. Vivienne Rabidue worked as an administrative assistant at Osceola Refining Co. The dissent explains that she filed the hostile environment claim on behalf of herself and other female employees "who feared losing their jobs if they complained directly." The women described a workplace where a poster was displayed for eight years of a nude woman reclining, with a golf ball on her breast and a man standing over with a golf club yelling "fore." One co-worker, Doug Henry, repeatedly spoke of women as "whores," "cunts," "pussy," and "tits," and said of Rabidue, "[a]ll that bitch needs is a good lay." (The majority referred vaguely to these remarks as Henry's "obscene comments about women generally.")

While the majority's dissent described the complained-of behavior in brief, non-specific terms, they explicitly characterized Rabidue as "capable, independent, ambitious, aggressive, intractable and opinionated" as well as "abrasive, rude, antagonistic, extremely willful, uncooperative and irascible. . ." *Id.*

67. *Id.* at 620.

68. *Id.*

69. *Id.* at 620-21 (quoting Rabidue v. Osceola Refining Co., 584 F. Supp. 419, 430).

70. *See* MACKINNON, *supra* note 33, at 220.

reasonable person standard, the court should adopt a "reasonable woman" standard.[71] Justice Keith explained, "In my view, the reasonable person perspective fails to account for the wide divergence between most women's views of appropriate sexual conduct and those of men."[72] He pointed to the majority's male-oriented presumption that the status quo was within the law and that a woman should accept it or leave her job.

The "reasonable woman" standard may treat women as too similar while not emphasizing enough their differences from men. Barbara Ehrenreich described Judge Keith's dissent as a "futile effort to overcome the contradiction between diversity and conformity."[73] However, a standard that fails to address diversity is not reasonable. A complainant's race, economic background and other factors must be considered.[74] In 1991, two influential courts introduced the "reasonable woman" standard.[75] In *Ellison v. Brady*, the Ninth Circuit Court of Appeals adopted a "reasonable woman" standard for hostile environment sexual harassment claims.

III. The "Reasonable Woman" Standard in *Ellison v. Brady*

In *Ellison v. Brady*, the court examined a claim of hostile environment sexual harassment from the perspective of a reasonable woman.[76] The three-judge panel of the Court of Appeals held that a prima facie case of sexual harassment would be found where a reasonable woman would consider that the alleged conduct was severe or pervasive enough to alter working conditions and create a hostile work environment.[77] The court found a valid claim of hostile environment sexual harassment in Kerry Ellison's complaint against Sterling Gray, an officemate at the Internal Revenue Service (IRS) who had written her a series of suggestive letters.[78]

A. Ellison's *Reasonable Woman: Speaking Out Against Harassment*

The *Ellison* court noted the inadequacy of the reasonable

71. *Id.* at 626 (Keith, J., concurring in part, dissenting in part).

72. *Id.*

73. Barbara Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177, 1216 (1990).

74. *Id.* at 1218-19.

75. Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991); Robinson v. Jacksonville Shipyards, 760 F. Supp. 1486 (M.D. Fla. 1991).

76. *Ellison*, 924 F.2d at 879.

77. *Id.* (citing Andrews v. City of Philadelphia, 895 F.2d 1469, 1482 (3rd Cir.1990)).

78. *Ellison*, 924 F.2d at 873.

person standard because of its incorporation of male-bias and disregard for women's distinctive experiences.[79] In its place, the court advocated the implementation of a "reasonable woman" standard, asserting that "a gender-conscious examination of sexual harassment enables women to participate in the workplace on an equal footing with men."[80] The attempted incorporation of the female victim's perspective provided a dramatic shift from previous cases which had focused on the alleged harasser's viewpoint.[81]

While the "reasonable woman" represents an improvement over prior standards, the attributes of the "reasonable woman" remain unclear and may, in fact, threaten the credibility of a broad range of women with hostile environment claims. As a standard shaped in a legal context, driven by the need for simple, predictable norms that lead to consistent decisions, the "reasonable woman" standard may exclude the varied perspectives of women of different races, classes, sexual orientations, and abilities. The "reasonable woman" construct may simply be a hollow shell, which has little to do with *real* women's lives and experiences. The absence of female judges from the federal courts deciding sexual harassment claims means that decision makers will probably have little familiarity with a woman's perspective on inequality in the workplace.[82] Yet the standard does represent a clear improvement over the former "reasonable man" standard and the more recent "reasonable person" standard. The "reasonable woman" standard, as elaborated in *Ellison*, does have the potential to improve the credibility of female complainants of hostile environment sexual harassment.

The *Ellison* court's dramatic shift of perspective begins with their decision to abandon the viewpoint (relied on in prior cases) of the male harasser and the defense of his conduct as inoffensive.[83] The shift in focus to the victim's experience of the har-

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79. *Id.* at 879.

80. *Id.*

81. *See, e.g.*, Rabidue v. Osceola Refining Co., 805 F.2d 611 (6th Cir.1986), *cert. denied*, 481 U.S. 1041 (1987).

82. Merrick T. Rossein, *They're for Women, Too*, NEWSDAY, Oct. 24, 1992, at 56. Rossein concludes that "until more women judges are appointed, the female perspective is virtually absent from the federal courts." *Id.*

83. Because I believe that sexual harassment in an employment setting is an extension of broader societal inequality, I will focus largely on sexual harassment of women by men. My belief is supported by statistics of sexual harassment claims, 92 percent of which are made by women against men. *See* Dana Priest, *Hill-Thomas Legacy May Be Challenges to Old Workplace Patterns*, WASH. POST, Mar. 12, 1992, at A8. I am considering the "reasonable woman" standard as a response to this category of harassment. By focusing on harassment of women by men, I do not mean to diminish the importance of also ridding the workplace of all other classes of sex-

asser's conduct is crucial to a fair hearing for the woman complainant. While Title VII never required a showing of invidious intent, cases prior to *Ellison* often excused conduct perceived by the victim as harassment because abusive intent was lacking.[84] The *Ellison* standard moves the law away from prior ingrained biases against women, which permitted this distortion.[85]

Ellison's "reasonable woman" standard goes beyond merely shifting the court's perspective from the harasser to the victim. *Ellison* openly recognizes certain characteristics about the victim and distinguishes the victim from the harasser. Most notably, the *Ellison* court recognizes that most victims of sexual harassment are women, and that as women, their experiences of harassment are fundamentally different from men's.[86] Indeed, the court relied on sources which revealed how in situations where women had been harassed, men had not perceived any harassment. Rather, men viewed the offensive conduct as "harmless social interactions to which only overly-sensitive women would object."[87]

In Kerry Ellison's case, the IRS conceded that Gray's behavior constituted sexual harassment, yet they argued that his actions were not severe or pervasive enough to merit protection under Title VII.[88] The IRS pointed to prior cases in which more compelling facts were held to have not "seriously affect[ed] the plaintiff's psychological well-being" and thus were not seen as actionable sexual harassment.[89] Yet, the *Ellison* three-judge panel chose to disregard those prior decisions.

The court held that harassment was actionable when the victim perceived the harasser's conduct as severe.[90] If the effect on the victim is sufficiently severe, the harasser cannot exculpate himself by insisting that he was without harmful intent.[91] The court gave greater weight to Kerry Ellison's experience and its of-

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ual harassment, whether directed against someone of the same sex or by women against men. Sexual harassment of all kinds is inappropriate, disruptive, disturbing, and offensive.

84. *Ellison*, 924 F.2d at 880.

85. *See, e.g., Rabidue*, 805 F.2d 611.

86. *Ellison*, 924 F.2d at 877-81.

87. *Id.* at 879 (quoting Ehrenreich, *supra* note 73, at 1207-08).

88. *Ellison*, 924 F.2d at 876.

89. *Id.* at 877. *See* Rabidue v. Osceola Refining Co., 805 F.2d 611 (6th Cir.1986), *cert. denied*, 481 U.S. 1041 (1987); Scott v. Sears, Roebuck & Co., 798 F.2d 210, 212 (7th Cir. 1986).

90. *Ellison*, 924 F.2d at 878. Judge Beezer elaborates, pointing to the ludicrous outcome of a Title VII policy which in defense of victims of sexual harassment, required proof of their complete psychiatric collapse due to the harassment, before any relief could be granted.

91. *Ellison*, 924 F.2d at 880. Judge Beezer further explains, "the reasonable victim standard we adopt today classifies conduct as unlawful sexual harassment even

fensiveness to her than to the relative inoffensiveness of the conduct as perceived by the IRS. In so doing, the court openly rejected *Rabidue* and other cases which had focused on the harasser's point of view.[92]

The court acknowledged that the use of a "sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women."[93] The "reasonable woman" standard is purported to facilitate equal participation of men and women in the workplace. The *Ellison* court demonstrated that the "reasonable woman" standard offered equitable means for measuring sexual harassment by contrasting the results under it with those under the prior "reasonable man" standard.[94]

The court concluded that the reasonable woman would consider the behavior of Ellison's co-employee, Gray, as harassment, whereas a reasonable man might think that Gray was a harmless, modern-day Cyrano de Bergerac who had not engaged in harassment.[95] In order to remedy sexual inequities in the workplace, the court rejects the "reasonable man's" perspective, and concludes that Gray's behavior was sexual harassment.

The strength of *Ellison*'s "reasonable woman" standard is in the verbal recognition of the gulf between men's and women's experiences, however these experiences are interpreted. The mere use of a new term, where another has existed unchallenged for an extended period of time, highlights the substantial differences between experiences and the need for separate standards to recognize these differences. The weaknesses of the "reasonable woman" standard, however, are the lack of explication as to who the "reasonable woman" is and what "reasonable" means. The vagueness of the standard could lead to varied interpretations by causing some courts to look to women's experiences for a fuller definition, while others continue to rely on traditional, male-oriented standards in the guise of a new name. The *Ellison* decision draws together some elements of each of these approaches.

Ellison concludes that while not all women think alike, there are nonetheless many women who share certain concerns which are not shared by men.[96] As an example of one of these distinctive experiences of women, *Ellison* suggests a woman's fear of violence

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when harassers do not realize that their conduct creates a hostile working environment." *Id.* at 880.

92. *Id.*

93. *Id.* at 879.

94. *Id.*

95. *Id.* at 878-80. *See also*, Ehrenreich, *supra* note 73; Abrams, *supra* note 63.

96. *Ellison*, 924 F.2d at 879.

from men, specifically sexual assault, and how this fear shapes her response to sexual harassment.[97] Since men rarely experience sexual assault, their perception of the risk of sexual harassment escalating into sexual assault is quite low. By thus introducing and defining the "reasonable woman" standard, *Ellison* began to supply plaintiffs with the solid argument of the credible, reasonable woman to respond to defenses of sexual harassment based on the harasser's perspective.

B. The "Reasonable Woman" as Limited Construct of Her Creators

1. Reasonableness: Can a Neutral Standard Answer a Fundamental Inequality?

The court cloaked Kerry Ellison in the mantle of the "reasonable woman" and thereby endowed her with greater credibility. Yet the vagueness of the "reasonable woman" construct, as it was used in Ellison's case, could limit a woman complainant's potential for bringing a successful sexual harassment suit. *Ellison* held that "a female plaintiff states a prima facie case of hostile environment sexual harassment when she alleges conduct which a reasonable woman would consider sufficiently severe or pervasive to alter the conditions of the employment and create an abusive working environment."[98]

While the court concludes that Kerry Ellison acted as a reasonable woman would have, given a similar situation, the identity of the "reasonable woman" remains obscure. Throughout the opinion, the majority seems to presume that what makes a woman employee reasonable requires no further comment. The court contrasts the attitude of a "reasonable woman" with the "idiosyncratic concerns of a rare hyper-sensitive employee."[99] The court also refers to the "effects of the sexual harassment on *reasonable* women," rather than on "women."[100]

By failing to define the limits of the "reasonable woman" construct, the court has left a void into which the particular facts of Kerry Ellison's case fit. Since the court holds that she is a "reasonable woman," for other women's actions and attitudes to be reasonable, they should follow the pattern set by Ellison. The risk is that in failing to meet this oblique "reasonable woman" norm, a complainant may be dismissed as "idiosyncratic or hyper-sensi-

97. *Id.*
98. *Id.* at 879.
99. *Id.*
100. *Id.* (emphasis added).

tive."[101] The court fails to clarify the meaning of either "idiosyncratic" or "hyper-sensitive," perhaps presuming the terms speak for themselves. This failure is somewhat disingenuous, given the fact that reasonableness standards are legal fictions, and the court is introducing a new standard.

Why then does the court fail to clarify what makes one woman reasonable and the other hyper-sensitive? The court appears to have entered a difficult area, where to admit to the need for a radically new standard which truly responds to societal inequities will place the court in conflict with its own principle of equitable treatment of all parties. While the "reasonable woman" standard reflects "the value of a jurisprudence that directly addresses the intergroup conflicts raised by legal cases," its vagueness "illustrates the tenacity of the idea that courts should not engage in explicitly political decision-making."[102] To explicitly recognize inequality while treating all fairly, as the *Ellison* court claims to do, may prove unworkable. The adoption of any neutral standard engenders a risk of merely echoing the values of a legal system which has long favored white men. "Blacks and women are the objects of a constitutional omission that has been incorporated into a theory of neutrality."[103]

Ehrenreich suggests that judges who had done so prior to *Ellison* had mistakenly concluded that "a reasonableness test could assure fair results to all."[104] She urges legal decision-makers to eschew purported neutrality in favor of fair results to all.[105] When legal decisions employ constructs that pretend to respond to societal inequities, "the major risk is that . . . the constructs will continue to hide power relationships and thereby legitimate a fundamentally unequal system."[106] By failing to recognize its own bias, the *Ellison* majority risks overstating the import of the standard which they have created, and its potential as a vehicle for true change.

2. Kerry Ellison as a "Reasonable Woman"

The *Ellison* court described in detail the initial harassing be-

101. *Id.*

102. Ehrenreich, *supra* note 73, at 1215.

103. PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 121 (1991). Williams states that "the real issue is precisely the canonized status of any one group's control. Black individuality is subsumed in a social circumstance—an idea, a stereotype that pins us to the underside of this society and keeps us there, out of sight, out of mind, out of the knowledge of the mind which is law." *Id.*

104. *Id.* at 1225.

105. *Id.*

106. *Id.* at 1231.

havior and Ellison's efforts to halt it. Kerry Ellison had documented the harassment with written testimony, had persisted in her complaint, and had gone to a supervisor who believed her, responded positively, and later served as a corroborating witness. The *Ellison* decision might serve to discount the testimony of another woman who experiences equally egregious harassment but does not amass evidence similar to Ellison's because her response was less than "reasonable."[107] Such a woman, of course, would be no less reasonable for choosing not to report the harassment to a superior, particularly a male superior.[108] Many women would consider not reporting an incident or series of events as the more reasonable option, in order to protect against personal and employment related retribution.[109]

The court indicated that understanding the victim's view requires, "among other things, an analysis of the different perspectives of men and women."[110] Yet the court's analysis of these differences is cursory. The court offers some examples to demonstrate the principle that "[c]onduct that many men consider unobjectionable may offend many women."[111] These examples, however, reveal more about a man's perspective of sexual harassment than a woman's.

The court cites a hypothetical situation used in a previous case to compare the perspectives of a male supervisor with a female employee regarding the supervisor's comments on the female employee's body or legs.[112] The supervisor might consider the

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107. *Ellison*, 924 F.2d at 876-81.

108. *Cf.* Bray, *supra* note 1.

> It was, after all, the Senate's appalling lack of familiarity with what it feels like to be powerless, vulnerable and afraid that rendered Anita Hill and her behavior incomprehensible to most of them. . . . Hill showed no signs of the Harriet Tubman Syndrome, the fierce insistence on freedom or death that made Tubman an abolitionist legend. Anita Hill grabbed no blunt objects with which to threaten her superior, she did not thunder into his office in righteous anger or invoke the power to bring suit. She was not funny, or feisty, or furious in response to the behavior she described. She was disgusted, embarrassed and ambivalent. Therefore, it must have been a dream.

Id.

109. *Id.* Carol Gilligan remarked of Anita Hill,

> It amazed me that no one understood the underlying logic of what she did. . . Her basic assumption was that you live in connection with others, in relationship with others. Now, her experience of that relationship was one of violation; it was offensive to her. But she was making the attempt to work it through the relationship; trying to resolve conflict without breaking connection.

110. Ellison v. Brady, 924 F.2d at 878.

111. *Id.*

112. *Id.* (citing Lipsett v. University of Puerto Rico, 864 F.2d 881, 898 (1st Cir. 1988)).

comments "legitimate" while the employee might regard them as "offensive."[113] The court recognized that men and women are offended by different things. The court's examples, however, focused on the male perspective of harassment, interpreting it as "harmless amusement" or conduct to which "only overly sensitive women would object." [114] Rather than clarify women's perspectives and why their experiences are fundamentally different from men's, these examples simply classify women's perspectives as the "other" and recount familiar male interpretations of the events. The explanation for the existence of concerns which are unique to women is perfunctory. The court's only attempt to explain why women find sexual harassment offensive when men do not is the court's recognition of women's "disproportionate" victimization by rape and sexual assault.[115]

This emphasis on the threat of violence as a legitimate cause of a woman's perception of harassment could lead to a higher standard of proof for women victims. For example, women may be required to demonstrate that they "reasonably" feared for their safety as a result of the behavior, rather than that the behavior offended them. While some women who are being harassed undoubtedly do fear the escalation of harassment into physical abuse, this fear is not a crucial or sole element in what makes sexual harassment offensive to women. Anita Hill commented, "We are angry because this awful thing called harassment exists in terribly harsh, ugly, demeaning, and even debilitating ways . . . . It is a form of . . . economic coercion."[116] Women who have been sexually harassed feel "humiliated, degraded, ashamed, embarrassed, and cheap, as well as angry."[117] Catharine MacKinnon concludes, "sexual harassment makes of women's sexuality a badge of female servitude."[118]

Rather than fully consider women's experiences of sexual harassment, the *Ellison* court relied on its judicial sense of fairness and the resulting need to protect employers. It, therefore, created

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113. *Id.* The court offered no explanation as to why the conduct might be offensive only to the employee.

114. *Id.* at 878-79, citing Ehrenreich, *supra* note 73, at 1207-08; Abrams, *supra* note 63, at 1203.

115. *Id.*; *see* Rivers, *supra* note 10 (citing FEDERAL BUREAU OF INVESTIGATION UNIFORM CRIME REPORTS FOR 1988 16 (1989)). The FBI report estimated that 73 of every 100,000 females in the country were reported rape victims. If the figure is correct however, it is certainly far below the number of victims of rape, who often choose not to report the offense.

116. Anita Hill, *The Nature of the Beast*, MS., Jan./Feb. 1992, at 32-33.

117. MACKINNON, *supra* note 33, at 47.

118. *Id.* at 177.

an incomplete and, in many senses, incorrect standard of behavior for allegedly reasonable women.

3. What Conduct Constitutes Sexual Harassment

Ellison offers little guidance on the limits of behavior which will qualify as sexual harassment. While an "isolated epithet" could not be the basis for an actionable claim, the court found that Title VII protection begins before the victim of sexual harassment requires psychiatric care, or (as in *Vinson*) before there is a forcible rape.[119] The court placed Ellison's co-worker's conduct between these extremes. The usefulness of these limits is uncertain however, since the range of behavior between them is so broad. The court allows that "well intentioned compliments by co-workers or supervisors" could be used to support a sexual harassment claim only if a reasonable victim of the same sex as the plaintiff would consider the comments sufficiently severe or pervasive to alter a condition of employment and create an abusive working environment.

Once again, the vagueness of the reasonableness standard prevents clarification of actual behavioral limits. The court's reliance on the reasonableness standard and concurrent reluctance to address the fundamental inequities faced by women in the workplace contributes to a muddled standard. The *Ellison* opinion reveals the divided loyalties of a court professing allegiance to both fairness and the recognition of inequality.

Rather than elaborate on the impact of sexual harassment on women, the court focused on the dangers to employers posed by sexual harassment claims. The court introduced the holding of the case with an explanation that it had come to the decision "[i]n order to *shield employers* from having to accommodate the idiosyncratic concerns of the rare hyper-sensitive employee. . ."[120] Rather than legitimize female victims' complaints of harassment, this explanation presumes that employers are at risk from women who, in their idiosyncracy and hyper-sensitivity, will victimize them. The "reasonable woman" standard is merely a tool for employers to distinguish between frivolous and legitimate complaints.

4. The "Reasonable Woman" Standard is Symbolically Useful but Practically Limited

The adoption of the "reasonable woman" standard in *Ellison*

119. Ellison v. Brady, 924 F.2d at 877-78.
120. *Id.* at 879 (emphasis added).

represents an important movement away from prior law which protected the workplace status quo. The court states in very clear terms, "Congress did not enact Title VII to codify prevailing sexist prejudices."[121] The case represents a definite shift from earlier cases which were reluctant to recognize anything but repeated sexual demands as sexual harassment.[122] The recognition that women victims' perspectives must shape the finding of hostile environment sexual harassment also represents a broad-based change in the law, with possible repercussions beyond the legal realm. Ehrenreich suggests,

> The primary benefit of retaining a problematic concept like reasonableness . . . is that [its] immense symbolic power can serve to legitimate the demands for social transformation that [it] is used to articulate, while [its] very vagueness and abstractness can allow [it] to serve as [a] valuable vehicle[] for generating dialogue on national values.[123]

The court, however, concludes too quickly that it has solved the problems of hostile environment sexual harassment law. Looking to the future, the court exclaims, "[w]e hope that over time both men and women will learn what conduct offends reasonable members of the other sex. When employers and employees internalize the standard of workplace conduct we establish today, the current gap in perception between the sexes will be bridged."[124] The court further asserts, "a gender conscious examination of sexual harassment enables women to participate in the workplace on an equal footing with men."[125] The court's presumption of the immediate resolution of an intractable, systemic problem by their mere "examination" or the adoption of their less-than-lucid standard reveals its failure to truly understand the dynamic of inequality which creates and perpetuates sexual harassment. Furthermore, the court has not overcome the inconsistency of pursuing the eradication of unfairness to all parties. While purporting to adopt a woman's perspective, the majority has in fact imposed a standard that relies on fairly traditional legal notions of reasonable behavior. The court does not explore Kerry Ellison's life and experiences. As with prior reasonableness standards, this standard "ignores the social reality of the individual."[126]

A standard that more closely approximates a woman's experience should fully consider several factors impacting the woman's

121. *Id.* at 881.
122. Abrams, *supra* note 63, at 1199.
123. Ehrenreich, *supra* note 73, at 1230.
124. Ellison v. Brady, 924 F.2d at 881.
125. *Id.* at 879.
126. Ehrenreich, *supra* note 73, at 1218.

life and work. Among other factors, courts should consider the woman's race, her class, her sexual orientation, any disabilities she might have, and her financial well-being. In *Ellison*, for example, the court fails to consider the plaintiff's financial status and whether she has savings to fall back on if she were to lose her job. Nor does the court consider her educational level, and the ease with which she might find other work. For a plaintiff who is a woman of color, the court should consider the powerful intermingling of prejudice on the basis of race and sex and the potential for mixed loyalties to each. A finding of an abusive environment may vary according to several factors and overlaps may exist.

IV. The Use of the "Reasonable Woman" Standard in *Robinson*

In *Robinson v. Jacksonville Shipyards*[127], a case decided concurrently with *Ellison* in the United States Middle District Court in Florida, Lois Robinson won a suit for hostile environment sexual harassment against the shipyard where she worked as a welder.[128] The opinion included long, detailed facts which highlighted persistent harassment at the shipyard over several years. While the court perceived Robinson as a credible witness, it did so somewhat reluctantly, guided especially by expert testimony.

The *Robinson* court emphasized the witness's testimony as "credible." However, it is not clear whether Robinson's testimony would have been perceived as credible if she had lacked corroborating witnesses or if the harassment against her had not been so egregious.[129] Calling her emotional demeanor at trial a "limitation," along with the fact that Robinson tried to ignore some of the harassment, the court concluded that "these limitations . . . do not diminish the weight and the usefulness of the testimony."[130] Lois Robinson's credibility was enhanced by the testimony of expert witnesses, who described typical reactions by women suffering sexual harassment and the phenomenon of sexual stereotyping.[131] The court devoted fully half of its opinion to a recitation of the voluminous, carefully documented incidents of offensive conduct, speech and display of offensive materials to which Robinson was subjected. The *Robinson* court thus found that the behavior of the shipyard workers directed at Lois Robinson created a hostile, abu-

127. Robinson v. Jacksonville Shipyards, 760 F.Supp. 1486 (M.D. Fla. 1991).

128. *Id.*

129. *Id.* at 1495. ("The individual episodes illustrate and lend credibility to the broader assertions of pervasiveness.").

130. *Id.*

131. *Id.* at 1502, 1505.

sive environment.[132]

The egregious harassment directed at Lois Robinson suggests that the Florida court might also demand a very high evidentiary standard from future plaintiffs. Those unable to demonstrate a level of harassment comparable to that experienced by Robinson could risk being dismissed as less than reasonable women, along the "idiosyncratic," "hypersensitive" line of *Ellison*. The inclusion of expert testimony might counter this risk, helping to explain typical reactions to harassment, such as withdrawal. Yet, in many cases, women experiencing more subtle forms of harassment might be precluded from successfully bringing suit.

V. The Civil Rights Law of 1991

Recent changes to the Civil Rights Act may also affect women's chances in filing hostile environment sexual harassment claims. The new law will affect sexual discrimination law in three areas: the availability of jury trials, the inclusion of expert witness fees as part of attorney's fees, and the potential to obtain compensatory and punitive damages.[133] A plaintiff could receive a maximum of $300,000 in punitive damages (although the jury would not be informed of the limit).[134] Taken together, these changes make the pursuit of a sexual harassment suit far more attractive than under the prior law.

VI. Conclusion

Since Anita Hill's testimony before the Senate Judiciary Committee in October of 1991, hostile environment sexual harassment law has entered the American consciousness. Not only a topic of casual conversation, employee training and orientations are now addressing the issue with growing candor.[135] These discussions may well contribute to the new understanding between men and women in the workplace to which the *Ellison* court aspired.

The consideration of sexual harassment in the legal setting has also become more pressing. Despite fears that the Judiciary Committee's harsh treatment of Hill would have a chilling effect on sexual harassment claims, the EEOC reported that the number

132. *Id.* at 1522-27.

133. THE BUREAU OF NATIONAL AFFAIRS, INC., CIVIL RIGHTS ACT OF 1991—ANALYSIS S-3

134. *Id.*

135. Dana Priest, *Hill-Thomas Legacy May be Challenges to Old Workplace Patterns*, WASH. POST, Mar. 12, 1992, at A8.

of complaints in the three months following Hill's testimony was nearly double that of the same period the year before.[136]

Ellison's "reasonable woman" standard functions as a corrective to women's credibility problems in hostile environment sexual harassment cases. The court's recognition of women's experience as different from that of the prior "reasonable person's" permit a far broader range of actionable sexual harassment claims. What was formerly considered harmless, idiosyncratic behavior, is being recognized with greater frequency as harassment of a reasonable woman. With this change, the believability of the women themselves is improving. The myth of a woman's oversensitive reaction to male's innocuous behavior still exists, but its scope is drastically diminished. Continued educational efforts in the workplace, and more broadly, in society, should result in continued clarification of what is sexual harassment. The standard should evolve over time, incorporating more elements of women's actual experience and simultaneously debunking the myths about women that have informed courts in the past. The attempted transformations of women's complaints into stereotyped roles, which do not permit them a sexual harassment claim, such as what happened to Anita Hill before the Senate Judiciary Committee and the press, should be firmly challenged by the "reasonable woman" standard.

While the standard may answer a need to clarify the unequal experiences of women and men in the workplace, and the distinctiveness of women's perspectives of men's harassment, it suffers from some troubling weaknesses. Courts must examine whether or not they can continue the fiction of remaining neutral while they favor a disadvantaged party. Similarly, the notion of "reasonableness" itself should be defined. To argue that a woman is reasonable without elaboration provides an inadequate guide for future decisions. Future cases should explore the question of whether the full range of women's behavior includes only the two possibilities of hypersensitivity or reasonableness, or if women experience a far broader range of emotion and character. Judges who consider the breadth of women's experiences, and how each is distinct from the other due to her race, class, level of disability, education, sexual orientation, and other factors, while also recognizing similarities among women, will be the most capable decision makers in cases of hostile environment sexual harassment.

136. *Id.* (there were 1,244 complaints to 728 the year before).